Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Structure and Practices of the Video Relay Service Program	)	CG Docket No. 10-51
	)	
Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities	)	CG Docket No. 03-123
	)	

COMMENTS REGARDING COMPENSATION AND OPERATIONS OF TELECOMMUNICATIONS RELAY SERVICES

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I. INTRODUCTION

Our nation benefits because people with disabilities advocated for equal access to telecommunications. The safeguards implemented at the federal and state levels secure equal access to the communication products and services utilized everyday by the broader society.

Beginning in 1982 the Telecommunications for the Disabled Act authorized local telephone companies to use revenues received from telephone services to subsidize the cost of specialized customer premises equipment (SCPE). The law permitted carriers to recover these costs in its tariffs for regulated service. Today, users may not be charged extra for the cost of making relay calls above what voice users would pay to make a call of the same distance and duration.

The reforms advanced by the Commission seem based on a notion that telephone accessibility is an entitlement. There is a fundamental distinction between people's claim right and an entitlement program that should inform the regulatory regime applied to telecommunications relay service (TRS).

A claim right establishes that another person has a duty to the right-holder; imposes a duty on others to act or refrain from acting. The Americans with Disabilities Act (ADA) establish a person's claim right to equal access. This claim consists of an obligation on covered entities and common carriers to enable a person with a disability to access an efficient and effective national telecommunications network.[1]

An entitlement is a government program that provides "financial benefits" or "government-provided goods or services" to an unspecified number of people after "meet[ing] eligibility conditions" required by the authorizing legislation.[2] The Lifeline and Link Up programs are entitlement programs because the authorizing legislation and regulations establish the eligibility in order to qualify for government-provided telephone service.

From a Congressional budget perspective, entitlement programs are difficult to predict and introduce difficulties in controlling the annual appropriations process. The interstate relay fund is not an annual appropriation. The interstate relay fund is at its essence a group-purchasing schema for common carriers obligated to ensure accessibility to their customers. In contrast, the entitlement programs of Lifeline and Link Up, funded through a line item on a ratepayer's bill, is an appropriation.

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[1] *A Glossary of Political Economy Terms*, Dr. Paul M. Johnson of Auburn University.

[2] *Id.*

Eradicating waste, fraud and abuse are appropriate goals to ensure an efficient telecommunications network. Congress delegated to the Commission more than just an obligation to ensure efficiency. Congress also delegated the obligation to ensure effectiveness. A few examples of harm to consumers and some providers because of the obsession to eradicate waste, fraud and abuse are:

- Commission scapegoating users for the lack of market prices that caused "perverse provider behavior" is antithetical to the ADA.
- Carriers stigmatize customers with disabilities by itemizing contributions to the relay fund as line item regulatory cost recovery.
- The Commission failed to intervene as wireless carriers instituted metered data plans that burden VRS users with higher data access costs compared to voice customers.
- All benefits of compliance run to the contributing carrier while the carrier providing relay assumes greater financial and compliance risk with no equitable reward for assuming the contributing carrier's risk.
- The Commission allowed carrier-in-name-only providers to enter the market destroying the historically successful TRS economic cost/compliance model.

Any real reform to telecommunications access must engage the myriad of stakeholders using modern regulatory approaches. The uncoordinated piecemeal approach, thus far, is creating confusion, greater complexity, while the duty and burden of accessibility is shifting away from the intended entities.

II. TRANSITION TO A MARKET-BASED COMPENSATION METHODOLOGY WILL CAUSE IRREPAIRABLE HARM CONSUMERS AND PROVIDERS.

The Commission rest their *ratio decidendi* upon an analysis that no price setting mechanism exists because there is no charge to users of relay. This is a classic fallacy because the argument is irrelevant; by attempting to prove difficulties in rate setting exist because of the undeniable fact – there is no charge to users of VRS – does not prove or disprove the difficulty in rate setting. The ADA prohibits a carrier from charging users with a disability more than a user without a disability, therefore users of VRS should not be charged for using it.[3] The Commission incorrectly claims users do not share in the costs of VRS. Because VRS users do purchase telecommunications services, whether it be wireless, landline or internet access, they absolutely do share in the costs of VRS - at no greater level than any other telephone user. The question is not whether difficulties of rate setting are attributable to users but whether, based on the lack of some charge - a prohibited charge - the Commission should adopt a market-based compensation methodology.

[3] 47 U.S.C. § 225(d)(1)(D).

The ADA sought to remove cost barriers levied upon people with disabilities. It is inaccurate to state that users "share none of the costs" because the ADA does not isolate a person with a disability from sharing in the costs of accessibility.[4] A June 27, 2013 letter from, House Committee on Energy and Commerce to the Commission, stated, "providers of interstate telecommunications services are responsible for funding TRS/VRS services, ultimately all users of telecommunications share in these costs." The ADA prohibits charging a particular individual for the cost of accommodations. If tariff rates factor the cost of accessibility then there is a charge to users of relay, it is simply no more than the cost that all users of telecommunications services pay.

The Commission buttresses support for actions taken in the Order because unlike a normal market participant, the TRS Fund "cannot "choose" how much service to purchase, and so has no control over total expenditures once rates are set."[5] The fact remains, the fund is not a normal market participant. If the Fund is a market participant the federal government should divest itself allowing the free market to operate. Though the Commission does not label it as "excessive accommodation," the dramatic steps taken in this context offer valueable insight into the issue. To the person without a disability what appears as "excessive accommodation" may in fact be "reasonable accommodation" to the person with a disability.

For example, pre-registered attendees to a conference can request an accommodation while other attendees may request an accommodation while registering the same day of the conference. The conference cannot choose how much to spend on accommodations because those costs are driven by attendee registration. Some attendees may cancel or show up with the unexpected extra guest. Ultimately, the conference is able to modify plans and manage a budget because all attendees (absent a stigmatizing line item cost) contribute through registration fees, including the attendees who have a disability. Because an attendee with a disability will share in the ultimate costs of those accommodations along with everyone else through increased registration fees there is an incentive to refrain from requesting excessive accommodations.

The current reimbursement rate setting process operates by projecting likely costs and developing a plan to deliver functionally equivalent service based on the projections. The TRS Fund cannot and should not choose how much relay to purchase, to do so would inherently reduce the availability of relay. In fact, the TRS Fund is not purchasing relay in the common understanding of a purchase. This view would see relay as an entitlement program, which it is not.

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[4] 26 FCC Rcd 17367, 17382, 2011 FCC LEXIS 5101 (F.C.C. 2011) "… the users neither receive nor send price signals because the service is provided at no charge to them. Thus, there is no opportunity for the market to set prices, enable price competition, determine industry structure, or influence demand."

[5] 26 FCC Rcd 17367, 17382, 2011 FCC LEXIS 5101 (F.C.C. 2011) "the TRS Fund is effectively the sole purchaser of VRS services but, unlike a normal market participant, the Fund cannot "choose" the volume (i.e., number of VRS minutes) to purchase, and so has no control over total expenditures once rates are set."

Permanent statute prohibiting a state or local government, business or other entity from discriminating because a person has a disability establishes a civil right, described previously as a claim right. The ADA establishes a claim right to compliant relay services from the provider of telecommunications servicing the individual's area. [6]

In contrast, an entitlement program is either "open or close ended." "Open-ended entitlement programs guarantee eligible individuals a specified level of benefits." Social Security Disability and Medicare are examples of these type of entitlement programs. Alternatively, a "close-ended" entitlement program provides a fixed amount of funds over a period and limited to eligible individuals to the extent there is available funds.[7]

The Universal Service Fund is an example of a close-ended entitlement program. "A discount to non-Tribal subscribers averaging $9.25 per month for telephone charges provided through Lifeline. Link Up provides a maximum discount of $30 for qualifying low-income households."[8] Lifeline provides residents of Tribal lands an additional $25 discount on monthly telephone charges. Link Up provides an additional $70 discount for low-income households.[9] Some states supplement these amounts with additional funding.

The Commission seeks to delineate duties and institute eligibility verification in the same way it conducts oversight of the Universal Service Fund (USF). Congress enacted the USF because it wanted to make sure low-income households fully participated in society and the economy by offsetting recurring charges for telephone service. The record shows it is a valuable public policy assisting many low-income households. [10]

"The principal of universal service mandates that everyone, regardless of income, has access at least to a minimum of telephone service."[11] TRS is a function of a service being universally available. However, the ADA establishes a claim right protecting those with a disability, regarded as having a disability and those

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[6] 47 C.F.R. §255(c) A provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable.

[7] *Emerging Disability Policy Framework: A Guidepost for Analyzing Public Policy*, Robert Silverstein

[8] Letter from Karen Majcher, Vice President, High Cost and Low Income Division, Universal Service Administrative Company, to Sharon Gillett, Chief, Wireline Competition Bureau, Federal Communications Commission, WC Dkt. No. 11-42 *et al.*, (filed Jan. 10, 2012) (*USAC 2011 Support Amounts Letter*) (stating that the vast majority of Lifeline subscribers receive support in the $8-10 range with an average amount of $9.25 in September 2011). In addition, ETCs may be reimbursed for the incremental costs of their provision of Toll Limitation Service to eligible households. 47 C.F.R. § 54.403(c).

[9] 47 C.F.R. §§ 54.403(a)(4) (Lifeline); 54.411(a)(3) (Link Up).

[10] The Commission received many letters from Lifeline subscribers, which have been placed in the record of this proceeding, expressing their need for Lifeline as their only connection to family, health care providers, and work opportunities. One disabled Lifeline subscriber in Tennessee describes her Lifeline service as exactly that – a "lifeline": "I have a 17-year old daughter with Down Syndrome. We help each other everyday [sic]. I do the thinking and she does what she can understand...[Lifeline] provides me a way to contact help if something happens and my daughter doesn't understand what we might need help for... but she does understand if I tell her 'Mommy needs the phone.' … it gives me peace of mind to know I can always call for help."

[11] U.S. v. Western Electric Co., 569 F. Supp. 1057

associated with persons with a disability from discrimination in public accommodations, transportation, and employment. Additionally, the ADA obligates telecommunications carriers to ensure access to their networks and service.[12] The mandate is functional equivalence.

The Commission places blame on users for "perverse provider behavior" which contributed to fraud and abuse due to the "absence of retail prices". The ADA explicitly places the duty upon the carrier and the obligation to ensure that network on the Commission. It is antithetical to the ADA for the Commission to shift blame onto the individuals the Commission is supposed to protect. Is this what Congress intended? How did we get to this point?

First, the Commission abandoned a long-standing successful economic paradigm when it opened the floodgates to providers operating as a common carrier in name only.[13] Prior to certifying Snap Telecommunications, Inc., Commission staff asked the founder and original owner, Daryl Crouse, how many telephone customers the company had.[14] An appropriate but unfortunately quickly abandoned question.

The Commission is well aware carrier-in-name-only providers are responsible for the difficulties. However, the Commission adopted reimbursement eligibility criteria abandoning the successful economic model allowing these abuses. The record shows the most perverse provider behavior committed by those common carriers-in-name-only that share none of the costs but reap excessive reimbursements the Commission attempts to lay at the feet of the person with a disability.[15]

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[12] 47 U.S.C. § 255(c) "A provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable."

[13] 26 FCC Rcd 17367, 17382, 2011 FCC LEXIS 5101 (F.C.C. 2011) "to the extent that that providers' other sources of revenue are de minimis and all VRS provider's costs are explicitly or implicitly supported by the Fund, there is frequent controversy over whether activities such as those related to customer acquisition and retention, equipment subsidies, and financing (e.g., interest payments) are legitimate or not."

[14] Based upon personal knowledge.

[15] *Structure and Practices of the Video Relay Service Program*, CG Docket No. 10-51, Declaratory Ruling, 25 FCC Rcd 1868 (CGB 2010) (*Compensable VRS Calls Declaratory Ruling*) (reiterating the scope of compensable VRS calls and curbing certain abusive practices); *see also Hands On Video Relay Services, Inc., Go America, Inc., and Purple Communications, Inc.*, Order and Consent Decree, 25 FCC Rcd 13090 (2010) (approving settlement for in excess of $22 million of alleged rule violations involving abuse of the TRS Fund)*; 2010 TRS Rate Order*, 25 FCC Rcd 8689 (changing the basis for per-minute compensation from provider projected costs to an average of the Fund administrator's proposed per-minute rates, calculated as a measure of actual, historical provider costs, and existing rates based on providers' projected costs); *Structure and Practices of the Video Relay Service Program*, CG Docket No. 10-51, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 5545 (2011) (*VRS Call Practices R&O*) (adopting rules to detect and prevent fraud and abuse in the provision of VRS); *Structure and Practices of the Video Relay Service Program,* Second Report and Order and Order, CG Docket No. 10-51, 26 FCC Rcd 10898 (2011) (*2011 iTRS Certification Order*) (revising the provider certification process to ensure that providers of Internet-based TRS (iTRS), including VRS, receiving certification are qualified to provide services in compliance with the Commission's rules); *Structure and Practices of the Video Relay Service Program*; *Healinc Telecom, LLC, Request for Reimbursement of July 2011 and August 2011 Video Relay Service Minutes*, Order, CG Docket No. 10-51, 27 FCC Rcd 9314 (2012) (denying payment to Healinc, a VRS provider, of amounts withheld by the TRS Fund administrator for non-compliance with the TRS rules).

The Commission may want to consider whether the TRS Fund under the auspices of the agency remains an effective way to ensure accessibility to a national telephone network. If private sector market competition is the goal, is the Commission the best avenue to accomplish the goal? Ultimately, carriers are the responsible parties to provide access. There is no other specific fund that reimburses, to the same extent, for other types of accessibility mandated by federal law; no fund to reimburse readers for the blind, dogs for the blind, no fund to reimburse doctors for sign language interpreters, etc. The responsible entities are held responsible and as such pay for accomodations accordingly.

Are carriers prohibited from creating a group purchasing model very similar to the current one without extensive entanglement from the federal government in that purchase?

Is the Commission adequately suited to oversee a market-based system expanding to include non-carriers?

The Commission is likely more suited to oversee that carriers comply with the law in a uniform fashion making it efficient to use, leaving economic efficiency to the carriers because they have a stake in making sure costs are reasonable.

TRS Historical Economic Paradigm

Simply stated:

- All common carriers required to ensure accessibility
- Only some carriers have the infrastructure and finances to provide TRS directly
- Those "provider-carriers" contribute to the fund
- Other "contributing-carriers" only pay into the fund
- Provider-carriers are de facto contractors for contributing-carriers because contributing-carriers deem them as access provided
- Provider-carriers assume the risk of negative public relations, capital allocated away from their core business, increased compliance and regulatory workload that distracts from their core business.
- Provider-carriers seek to affect their contribution factor – total contribution - by operating an efficient relay service with the goal of reducing the fund requirement through lower reimbursement rates.
- A reduced fund requirement reduces the provider-carrier contribution freeing capital for investment in other business lines of the telecommunication service provider.

Historically, this economic model showed tremendous success as the cost of relay trended downward while service quality and functional equivalence trended upward.

<u>Contracting Neutral Video Communication Service Provider</u>

The law and public policy obligates telecommunications service providers to ensure accessibility. If the Commission decouples tasks associated with the obligation it will further exacerbate the current problem of providers reaping reimbursement from the fund who are not also required to contribute to the fund. The concept of a group-purchasing fund will never succeed without the inherent downward pressure on reimbursement rates exerted by excluding carrier-in-name only entities.

III. USING AUCTIONS TO ESTABLISH A PER MINUTE RATE FOR CA SERVICE WILL NOT PROMOTE THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY.

An auction of any kind traditional or reverse would decouple a carrier's duty to ensure accessibility for users in their area by auctioning some portion of their users off. If a carrier later determined the auctioned service is subpar, creating potential liability exposure under the ADA for failing to ensure accessibility how would the carrier remove that traffic from the auction? How will offloaded traffic and relay services be reimbursed?

By auctioning the right to provide VRS CA service the Commission would decouple the obligation of carriers to ensure accessibility by transferring the obligation by contract to the winning bidder. Congress delegated broad authority to ensure an efficient and functionally equivalent network. What is the Commission's basis for delegated authority to transfer accessibility obligations established by the ADA?

An auction system would not promote the public interest, convenience, and necessity. [16] Concurring with consumer groups, using an auction removes consumer choice and creates a less than functionally equivalent service. Hearing telephone users choose the telephone provider. Auctioning distinct telephone numbers indiscriminately removes choice from countless users.

Sign Language interpreters provide effective communication offered in a functionally equivalent manner through technology. Deaf and hard of hearing individual's reason for communicating over the telephone are boundless which requires extensive training and skill development of Sign Language interpreters. A singular

[16] *See* 47 U.S.C. § 257(b) "In carrying out subsection (a) of this section, the Commission shall seek to promote the policies and purposes of this chapter… promotion of the public interest, convenience, and necessity."

focus on price will erode, over time, training and development of video interpreters. It does not promote the public interest if VRS users are unable to communicate effectively because video interpreters lack the necessary training.

An auction system would not encourage technological advancement. The fundamental goal of an auction is to get the lowest price available. The Commission does consider research and development in terms of the technology used in relay through a proposed contract with the National Science Foundation. VRS is more than just the technology. The auction system does not influence National Science Foundation's work, but it would influence the work of video interpreters.

Emergency 911 calling is a vital public safety part of relay. Will emergency calls be included in the same auction? What criteria will be used to guarantee the public there will be sufficient training of CA's to ensure effectively and timely emergency call processing?

IV. WHEN CARRIERS ITEMIZE INTERSTATE RELAY CONTRIBUTIONS LISTED AS A SEPARATE LINE ITEM RELAY USERS ARE UNFAIRLY STIGMATIZED.

As early as the Telecommunications for the Disabled Act, common carriers included accessibility costs in regulated tariff rates. Telephone bills did not detail a specific line item as the contribution; instead, tariff pricing incorporated it as any other business expense. Historically, common carriers factored TRS contributions into their final pricing. Telephone bills did not itemize the contribution for interstate relay. In contrast, the certified state program impose a surcharge identified on customer bills.[17]

The Commission appears to allow or is unaware many carriers are now identifying interstate relay services as a separate line item surcharge. Unfortunately, this new and questionable approach stigmatizes deaf and hard of hearing users by specifically identifying TRS through a line item charge.[18] Some carriers go so far as to claim a truth in billing requirement by adding a specific surcharge – similar to the Universal Service Fund.

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[17] *2011 VRS Reform FNPRM*, 26 FCC Rcd at 17409, ¶ 103 n. 209 surcharge on their monthly service bills or as part of the rates for the state's intrastate telephone services.

[18] These are just a few examples of how carriers are identifying the cost of relay:
AT&T Billing Glossary, *"Telecommunications Relay System This charge funds the Telephone Relay Access Corporation for the hearing and speech impaired, a program providing telephone transmission services to people with hearing impairment or speech impairment."* This charge is separate and distinct from another line item *"DEAF Surcharge This surcharge shall be identified on the telephone bill as the "CA Relay Service and Communications Devices Fund."*

Birch Communications, http://www.birch.com/about/images/BirchUnderstandingYourBill_2012.pdf, *"INTERSTATE DEAF RELAY FUND $0.91"*

XO Communications, *"Federal Regulatory Cost Recovery Fee This is a monthly charge that allows XO to recover costs imposed by federal regulation including, but not limited to, funding Telecommunications Relay Service for the hearing-impaired, national number administration, and federal regulatory fees. The Fee is assessed on Carrier customers' net interstate and international service charges, exclusive of taxes."*

Congress did not intend accessibility costs to be itemized as it would discourage creating accessibility. For example, doctors, concerts and universities do not itemize normal business costs (i.e. accounting, maintenance), including accessibility expenses; Congress envisioned the same for relay. Honorable Steny H. Hoyer, remarked June 13, 1990 in the 101st Congressional Record, "the method of funding ultimately chosen for interstate services… should not be identified on telephone bills in a way that would suggest that relay services are only for deaf and hard-of-hearing individuals. There is no reason to single out and to stigmatize individuals with hearing impairments." Congress expected there would be no prejudicial labeling of "any funding mechanism" for relay.[19]

The Commission must act immediately to stop prejudicial labeling by requiring carriers to incorporate, as previously done, relay expenses into general operations. In a 1991 article Karen Peltz Strauss stated, "inclusion of relay expenses as general operating expenses furthers the true concept of universal service. Just as the higher costs of providing rural telephone service are rolled into general telephone rates, so too should carriers recover the costs of providing equal access for deaf and speech-impaired individuals in the basic rates paid by all telephone subscribers.[20]

V. USING THE COST OF THE NEUTRAL VIDEO COMMUNICATION SERVICE PROVIDER CONTRACT AS A BENCHMARK INADEQUATELY ACCOUNTS FOR THE DISTRIBUTION OF RISK AND BENEFITS ACROSS CARRIERS.

Provider-carriers assume great financial and compliance risks while contributor-carriers are able to simply designate the provider-carrier as satisfaction of compliance. Contributor-carriers enjoy all the benefits of compliance without any of the inherent risks of providing accessibility. The Commission has stated the duty to provide relay is independent from TRS contributions. As discussed previously, carriers are falling short of eliminating the attitudinal barriers people with disabilities experience. The prejudicial labelling is a symptom of a systemic attitudinal barrier all too familiar to people with disabilities.

Attitudes change because organizations learn about their customers through customer service interactions. These interactions will never occur if a carrier can choose to simply send a check every month and never have to understand their customers with disabilities. Here, the Commission proposes to reward those carriers who choose to contribute while ignoring the spirit of true accessibility. Because exclusive contributor-carriers are removed from any compliance risks they are failing to understand the negative impacts a simple line

[19] *Breaking down the Telephone Barrier - Relay Services on the Line*; Strauss, Karen Peltz; Richardson, Robert E. 64 Temp. L.R. 602 (1991)

[20] *Id.*

item on a bill can have. If the Commission further removes any operational responsibility from carriers this problem will only become worse.

VI. HEARING INDIVIDUALS SHOULD BE ABLE TO ACCESS POINT-TO-POINT CALLS USING A TEN DIGIT NUMBER

Universal Service Basis

The 1934 Communications Act delegated the responsibility of regulating interstate and foreign commerce in communication by wire and radio to the FCC. Congress mandated the Commission to ensure "a rapid, efficient, nation-wide, and world-wide wire and radio communication service" for the public good. Today, this responsibility is known as "universal service," but it is not limited to only certain groups. Historically, rules adopted by the Commission extended affordable telephone service in rural areas and improved access to basic telephone services by people with low incomes. The Commission envokes universal service authority numerous times in the present NPRM. This authority would similarly apply in the context of hearing individuals access to point-to-point calls. The Consumer groups correctly identify several benefits, financial and social, any of them sufficient to extend numbering to hearing individuals.

Public Accommodations Basis

The ADA prohibits public accommodations from discriminating against an individual based on that individual's association or relationship with an individual with a disability seeking to communicate with person with a hearing or speech disability are associating.[21] The Commission should consider whether telecommunication carriers are simultaneously a public accommodation as well as carrier. If true, then hearing individuals are associated or seek to communicate via the telephone network because of the relationship with the individual with a disability not the content of the communication.

In *Oliveras-Sifre*, the Court noted plaintiffs did not allege discrimination because they associated with particular disabled person(s) but rather punishment for advocacy positions.[22] The record is replete with examples, parent and child, spouses, employer and employee, accountant and client, customer and technical support, citizen and government agency. But for, the hearing individual's association with particular disabled person(s) they could make a point-to-point voice call to any other person without a disability using a ten digit

[21] 42 USC § 12182(b)(1)(E)

[22] Oliveras-Sifre v. P. R. Dep't of Health, 214 F.3d 23 (1st Cir. 2000)

telephone number. Hearing individuals are unable to make direct point-to-point calls to individuals with a disability using a ten digit telephone number because the Commission prohibits certain individuals from obtaining a video phone number.

The neutral video communication service provider and/or integrated VRS providers should not be permitted to sell point-to-point service to hearing individuals - carrier contributions should be used to ensure equal access for persons who associate with disabled persons. Further, the Commission should not approve a charge upon a particular individual or group for the cost of accessibility. Charging a person because of their association with a person with a disability because they want to make a direct video call is not in the spirit of the ADA.

Presumably, the hearing person already has voice telephone service via landline, VoIP or cellular, therefore a number is already paid for. Requiring double payment from the hearing individual for a video phone number is a surcharge placed on a particular individual or group for the cost of the accommodation. Because the ADA protects individuals who associate with a person with a disability it would be discriminatory to charge a hearing individual a particular surcharge in order to make direct calls to the associated individual with a disability.

VII. HEARING INDIVIDUALS SHOULD NOT BE FLAGGED BY DEFAULT AS NON-COMPENSABLE

The Commission should adopt a descriptive flag other than “non-compensable”. A person with a disability visiting a family member’s house should be able to use the phone just as any family member would. Thus, those calls would be compensable. A default of non-compensable would inevitably under account for truly compensable calls.

Other relevant factors

The Commission should seek to unify numbering so that a hearing person with a voice number could simultaneously assign that number to a video phone for receiving direct video calls. It should not matter which type of device so long as the appropriate routing occurs based on device features, avoiding the awkward situation - one number for all the hearing and a different number for the deaf family members.

VIII. TRS FUND ADVISORY COUNCIL

Concurring with consumer groups the role of the advisory council should expand.

IX. RECOMMENDATION FOR THE USE OF AUDITED SELF-REGULATION AS A REGULATORY TECHNIQUE IN RELAY

The piecemeal approach taken by the Commission produces uncertainty and does not serve the public interest. Greater complexity further increases provider costs and diverts significant stakeholder resources from more productive activities.

The Telecommunications Relay Fund Administrator, a contracted function conducted by an accounting firm is the predominant reimbursement oversight of relay. The following recommendation is not a criticism or denigration of the work done by the current administrator. The current approach to oversight is simply too narrow, focusing mostly on quantitative measurements. Functional equivalence based on quantitative and qualitative oversight leads to innovation. A recent example is expanding access to relay for individuals who are Deaf-Blind or low vision.

The Commission essentially adopts a quantitative/qualitative paradigm, if only in an incremental piece-meal approach through contracts with a neutral provider, the National Science Foundation, the SIP Forum and other proposed reforms. The piece-meal approach lacks coordination and collaboration among the many move parts.

What is "Audited Self-Regulation"?

Audited self-regulation (ASR) is often misunderstood. A self-regulatory organization (SRO) can be delegated the power to create and enforce rules outside of a federal agency. SRO's typically comprise the regulated entities and other stakeholders. Audited self-regulation further delegates authority over implementation of rules created by the agency, enforcement of penalties, subject to review by the agency.

The federal government often delegates to a standards organization voluntary compliance for specifications, features, protocols. Historically, the Commission shied away from including specific standards in regulations because technology changes rapidly and regulatory specifics may hinder innovation.

The Commission employs a weaker form of regulation – "self-reporting" because there is no self-regulatory organization at this time. Here, the Commission proposes to delegate to the National Science Foundation and the SIP Forum development of standards, voluntary because of universal recognition, yet without explicit enforcement. Relay providers have little to no power to interpret any regulation, but continually ask for more nuianced interpretations from the Commission. Providers report as required by the regulation, but enforcement is limited to action by the Commission, except to the extent that provider enforces the regulation upon itself through compliance. For example, providers report speed of answer and complaint logs. Additionally, providers enforce the requirement of terminating a call suspected to be fraudulent. Complaints and non-compliance linger for months because the current system requires action by the Commission.

Many examples of self-reporting can be found; financial condition of banks, air pollution monitoring, permit requirements for water pollution reporting, and the familiar if not most popular annual report of taxpayer income. Currently, the Commission qualifies the TRS Fund Administrator to collect funds from carriers, examine whether services are provided in accordance with the Commission's TRS rules, analyze providers' submissions to detect changes, irregularities, or trends in minutes billed that may suggest irregularities or violations of the Commission's TRS rules or may constitute other indicia of fraud, establish and implement internal controls and procedures, subject to Commission approval, to cease payment to TRS providers that fail to demonstrate full compliance with all relevant Commission rules governing the provision of TRS, fail to justify or document requests for reimbursement from the TRS fund, or engage in potential waste, fraud, or abuse, oversee audits and on-the-spot investigations of TRS providers performed by an external auditor to ensure that all claims for payment are legitimate, verifiable and in accordance with the Commission's rules and general policies governing the provision of TRS.

ASR would expand those tasks to include outreach, R&D, and development of interoperability standards, just to name a few. A private non-profit Self-Regulatory Organization (SRO) comprised of the carriers, consumers and stakeholders would need to be created. The SRO would be responsible for conducting site visit inspections in much the same way the Joint Commission on Accreditation of Healthcare Organizations does for hospitals. The Commission inquired about whether a provider should have some minimal qualifications. The SRO would be responsible for developing those qualifications, confirming and monitoring them with reporting to the Commission.

Cost – Benefit Analysis of Audited Self-Regulation

Benefits of Audited Self-Regulation

Generally, audited self-regulation (ASR) provides benefits to the public compared to self-reporting with limited potential costs. Researchers identify five distinct benefits of audited self-regulation compared to other regulatory schema.

1) More effective rules due to SRO's subject matter expertise compared to the agency.
2) More diverse compliance methods.

3) Regulated entities acceptance of rules resulting in better compliance.

4) Cost savings to the government passed through in lower regulatory costs.

5) Modern regulatory reform shifting from methods of "command and control"

1) Subject Matter Expertise

SRO's are composed of entities and stakeholders with an interest in and knowledge of the subject matter. Here, the SRO could comprise consumer organizations, carriers, representatives from the workforce. Each of them have an interest in and have deep knowledge of TRS.

2) Compliance Diversity

SRO's can modify their rules more easily to address technology changes. SRO's are in a better position to know if a rule change; separate from technology, results in better compliance. The rigidity of rulemaking proceedings at an agency can inhibit innovation and slow response to technology changes. ASR implements an informal structure for entities and stakeholders to maintain current and cost-effective rules without abandoning all agency oversight.

3) Compliance Incentives

Self-regulation produces rules from the expert knowledge of the entities and stakeholders tailored to the industry. Importantly, because the entities and stakeholders are directly involved in the process, they view the rules as more reasonable.

4) Cost Savings to the Federal Government

The government can recognize a cost savings because ASR requires less agency resources than self-reporting. Any savings enjoyed by the government is appropriate because those costs should be borne by the carriers, the responsible entities under the ADA.

5) Modern Regulatory Reform

The government's role in administration of the law experienced a dramatic shift in the past thirty years. The regulatory method is universally the point of contention. The "command and control" method of regulation is problematic because it does not deal with market failures in different industries. Any rule the Commission attempts to apply will inevitably create absurd results (brown-bag programs, podcast calls, etc.)

Eventually, "social" regulation specifying results to be achieved based on output standards leaving the regulated entities responsible for determining how to achieve those results to the regulated entities.

Costs of Audited Self-Regulation

Researchers also identified potential costs of audited self-regulation.

1) Inadequate enforcement
2) Unreviewable discretion
3) Limitations on delegation

1) Inadequate Enforcement

The perception of the subject industry "owning" the agency subverting regulatory goals for private interests is always possible. Members of an industry, well intentioned as they may be, may not commit the resources necessary for vigorous self-enforcement. The counter to this concern is to ensure significant pressure from interest groups. Here, the consumer groups and workforce represntatives would counter the perception of inadequate enforcement.

2) Exercise of Unreviewable Discretion

Because ASR discards a strict adherence to rules and regulations, it can appear to weaken enforcement. In fact, the flexibility for tailoring enforcement to relay service practices make ASR more effective. No one can accurately predict, in the abstract, the benefits or harm. The best approach is to review and limit discretion, not eliminate it.

3) Political Restrictions on Delegation

Because of the savings and loan failures in the 1980s and the most recent financial crisis inflicted on the economy, no matter how efficient or thorough auditing done by an industry, Congress certainly would not allow financial institutions to adopt this approach. Relay is not burdened by this past, even considering recent problems of waste, fraud and abuse, those actors are no longer involved in the industry.

Elements of Effective Audited Self-Regulation

For effective self-regulation, an industry, agency and statute must have certain characteristics. The process must ensure fundamental procedural fairness required by the Constitution. Lastly, anti-trust or tort liability of the SRO, to the extent possible, avoided. The SRO must have the subject matter expertise. Commission staff must be able to audit the SRO, including independent plenary authority to enforce rules or review decisions of the SRO. Rules for notice, hearing, impartiality, and open public records and proceedings observed.

In relay, this approach may result in better regulation because the Commission's empowering statute and rules are supplemented and enforced by those entities directly involved in providing video relay, which may have more detailed knowledge of the operational or technical aspects of that activity. The regulatory program also may be more effective because of tailoring to the highly technical and unique requirements of relay. Regulatory enforcement costs could reduce under this approach. Although such cost reductions should be considered only if achieved with consistent effectiveness of enforcement.

For this regulatory technique to work, effective interest groups must exist. They must have access to the agency to raise concerns about the conduct of the self-regulatory organization. The Commission must vigilantly oversee the activities of the self-regulatory organization and of the regulated entities themselves.

A survey of other federal agencies experience with audited self-regulation reveals common elements of effective programs:

- industry members are organized, expert, and motivated to comply;
- the regulatory program requires individualized application of clear rules which can be objectively applied; and,
- agency expertise to effectively audit self-regulatory activity.

Recommendation

The Commission should consider audited self-regulation as a regulatory technique when designing, revising, or reevaluating the regulatory framework around relay, if it can be effective and operate fairly.

X. THE COMMISSION MUST CAREFULLY CONSIDER FEDERALISM DETERMINING WHETHER TO INTERVENE IN NON-COMPETITION AGREEMENTS IN VRS CA EMPLOYMENT CONTRACTS.

Non-compete or restrictive covenants are common between a company and executive or management level employees. The validity of these covenants are determined by state law and in rare circumstances by the rules of a regulatory agency. Several providers petitioned the Commission to intervene and decide the validity of Sorenson's restrictive covenant contained in the Sorenson employment agreement. Ironically, the petitioners do not provide any specific identifiable detrimental instances of covenant enforcement.

The current TRS scheme has no rule applicable to the petition before the Commission, thus, there should be a determination if the Commission has the necessary authority to regulate a TRS provider's contractual relationship with employees.

There is a strong centralization of most telecommunications policy. At the core of resolving the issue of non-compete covenants requires the Commission to reconcile constitutional federalism as a national value and the substantive goals of telecommunications policy. The FCC should preempt state jurisdiction of provider employment contracts only when there is a failure to carry out the responsibility to ensure an accessible and functionally equivalent telephone network.[23] Section 252(e)(5) would not directly apply because relay is not a tariff service. Because the Commission has broad authority in this field almost any reason could justify preemption without a finding of tariff service.

The Commission does also determine it should not preempt state action. For example, in *Global NAPS*, the court found the decision not to preempt the state, a "reasonable interpretation" "consistent with" the past practices and precedents of the Commission. Therefore, precedent for deference to state decisions does exist.[24]

Additionally, three justifications for leaving this issue to the states are:

1) States are "close to the people" protecting individual liberties.
2) Decentralization fosters innovation to address policy concerns.
3) States offer a greater range of choices, both political and cultural, not available at the federal level.

The justifications offered by other commenters resonate of important goals of relay. However, this is fundamentally an issue between an employer and the employee. The individuals freely contracted; agreeing to the covenant. The Commission should be cautious in concluding there is justification for intervening to regulate these agreements.

1) Allowing each state to address local workforce concerns through state contract law provides the greatest opportunity for innovation at the closest level of government. Some states have interpreter-training program(s). Others have a state agency responsible for oversight of interpreting, Deaf education, accessibility, etc., while some non-profit Deaf associations guide the interpreting field.
2) For example, a provider operating in state with a limited workforce can address the concern of insufficient interpreters for community appointments by allowing more hours outside of

[23] See 47 U.S.C. § 252(e)(5), requiring preemption of a state regulatory commission that "fails to act to carry out its responsibility" approving or rejecting interconnection agreements local exchange carriers enter into.

[24] Global NAPS, Inc. v. FCC, 291 F.2d 829, 833 (D.C. Cir. 2002)

video relay. Alternatively, the provider could establish formal mentoring programs provided by their employees to train new interpreters.

3) Deaf associations carry a great deal of political influence to oppose or support a specific restraint on a state level. Consumers can challenge an incompatible restrictive covenant in one state while not restricting what works in another state.

The sheer size and complexity of the industry, education, social aspects involved leaves little hope the Commission could effectively tailor a rule for each State. Of course, a state by state approach does not provide economies of scale in relay nor optimal employment of interpreters. The Office of Management and Budget (OMB) encouraged regulatory agencies to "consider the employment effects (negative or positive)," because there is "potential for long-term adverse consequences of reduced employment for affected workers and their families."[25] Exercise of regulatory restraint may be in the best interest of the relay program and respect for the cooperative federalism embodied in the program. Regardless, a single challenge in state court is likely to yield the same result other commenters advocate for. Any enforcement of a restrictive covenant protecting training investment is unlikely.

Cost/Benefit Analysis of Allowing / Prohibiting Non-Competition Agreements

Harm to VRS providers or consumers - Limitations on the pool of VRS CAs, Undue Hardship to the Interpreter

An original public policy concern with covenants not to compete, in addition to being anti-competitive and thus depriving the public of adequate choice, enforcement might deprive the restricted interpreter from earning a living. If the covenant would effectively remove an interpreter from the marketplace entirely, by either explicitly or as a practical matter prohibiting him or her from practicing entirely, such an undue hardship can render a covenant unenforceable. If it would be difficult to maintain an adequate practice outside the restricted areas the hardship to interpreters is sufficient justification for refusing to enforce the covenant because it might necessitate a move, and perhaps a move to an alternative metropolitan area in the state.

While enforcement of the covenant would no doubt have an adverse effect on an interpreter's practice, and would probably amount to an "undue hardship" that would prevent enforcement of the covenant, the Commission does not have the resources to adjudicate the vast differences in circumstances. However, if enforcement is unlikely, state courts are better suited to determine the resolution.

[25] *Draft 2013 Report to Congress on the Benefits and Costs of Regulations*, Office of Management and Budget, p. 61.

Availability

The public always has an interest in the availability of an adequate number of providers of any good or service. Thus, all non-compete agreements are scrutinized to make sure that the covenant does not shield the covenantee from minimal competition necessary to provide goods and services at the highest output and lowest cost to society. Such a concern is paramount concerning non-compete agreements applicable to interpreters, as the public has a vital need for video relay service. Courts in many jurisdictions refuse to enforce covenants that otherwise appear reasonable in scope for this public policy concern. For example, the court denied an injunction against a podiatry specialist because testimony indicated a shortage of specialists in the county and patient appointment delays. Similarly, the court did not enforce a covenant against an ear, nose, and throat (ENT) doctor where the court noted the state experienced a shortage of specialists. [26]

If the shortage of interpreters would be as problamatic as the proponents of Commission intervention argue, a state court would likely refuse to enforce the restrictive covenant. However, there are some areas of the country where there are a sufficient or abundant number of interpreters. Again, this variation justifies regulatory restraint by the Commission, intervention could not equally address the facts on the ground.

Consumer Choice

If the restrictive covenant is enforced will it foreclose consumers from using a different provider if they desire to do so? If a covenant not to compete fully removes user's ability to continue to use the provider of their choice, where functional equivalency relies on the individualized nature of the interpreter/user relationship, the covenant may run afoul of public policy.

For example, a court recently denied enforcement of a covenant against two pediatric specialists with many special needs patients in the restricted area, even though the community would still have had five pediatricians in the restricted area. Given the nature of the relationship between the pediatricians and their special needs patients, the covenant was unenforceable due to public policy. Here, the relationship between specific interpreters and relay users is minimal. Users do not have the ability to choose a specific interpreter to interpret the call. Interpreters do not know who the next user will be. There are great suggestions for improving call succcess using skill based routing, but the basis of the suggestions are skill not availability.

Cost / benefit of prohibiting or limiting agreements

[26] See generally, *ENT Inc. v. Atkinson*. In *New Castle Orthopedic Associates v. Burns*, enforcement denied against an orthopedic specialist who was one of only two such physicians in a small community, because the result might leave the community in a vulnerable position.

<u>The Commission does not have regulatory power over local disputes that are separable from and do not substantially affect provision of relay or development of interstate relay.</u>

Section 225(d)(1)(A) directs the Commission to "establish functional requirements, guidelines, and operations procedures for telecommunications relay services." There is no precise location where state and federal regulatory power divides. However, the Court has deprived the Commission of regulatory power over local services, facilities, and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications.[27]

<u>Separability</u>

All providers must meet the mandatory minimum requirements (functional and operational). There is no question whether Sorenson and the other providers meet the mandatory minimum requirements. Because Sorenson, with a restrictive covenant, meets the same mandatory minimum requirements providers without a restrictive covenant do, it can be said the restrictive covenant is seperable from the functional requirements, guidelines and operational procedures for telecommunications relay service the Commission has authority to address.

<u>Substantially Affect Conduct or Development</u>

Further, relay is conducted every day without incident caused by a restrictive covenant. The Commission has a long record of improving interstate relay service and continues to develop the service to improve interstate communications. Because the restrictive covenant is separable and does not substantially affect or impede interestate communication the Commission does not have the authority to intervene except under certain circumstances.

<u>Regulatory agencies can impose limitations on restrictive covenants by regulated entities under certain circumstances</u>

There is precedent for a regulatory agency through a self-regulatory organization addressing an issue impacting the public rooted in a restrictive covenant disagreement between a former employer and employee. The Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC") proposed rule change SR-FINRA-2008-052 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").

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[27] *North Carolina Utilities Com. v. Federal Communications Com*., 537 F.2d 787, 793, 1976 U.S. App. LEXIS 11809, 36 Rad. Reg. 2d (P & F) 1397 (4th Cir. 1976) "…no doubt that the provisions of section 2(b) deprive the Commission of regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications."

FINRA sought to address the practice of delaying customer account transfer by adopting a rule that, when a registered representative leaves his or her firm for a position at a different firm, clients serviced by the registered representative may decide to continue their relationship with the registered representative by transferring their accounts to the registered representative's new firm. The registered representative's former firm, concerned the former employee possibly breached his or her employment contract by sharing client information with the new firm or by soliciting clients to transfer their accounts to the new firm, sometimes would seek a court order to prevent the transfer of accounts.

Adopting rule, IM-2110-7, FINRA limiting a firms from interfering with a customer's right to transfer his or her account but does not affect the ability of member firms to use employment agreements to prevent former representatives from soliciting firm customers and firms are not prevented from pursuing other remedies arising from employment disputes with former employees.

FINRA stepped in only after determining that the proposed rule change complied with the requirements of Section 15A(b)(6) of the Securities Exchange Act of 1934 requiring, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA determined the proposed rule change would further the purposes of the Securities Exchange Act of 1934 because it would protect investors and the public interest by addressing interference with the transfer of customer accounts in the context of employment disputes.

Under the Commission's designated authority to establish functional requirements, guidelines, and operations procedures for telecommunications relay services it has the authority to prevent the exact types of harm FINRA addressed. In fact, the Commission protects consumers through various rules, the most notable being "slamming". Slamming is the illegal practice of switching a consumer's traditional wireline telephone company for local, local toll, or long distance service without permission. The slamming rules also prohibit unreasonable delays in the execution of an authorized switch by a local telephone company. Within the relay context slamming rules prevent users default provider from being changed without their permission and prohibits unreasonable delays to changing when approved.

Here, the petitioners do not allege delay when a consumer seeks to transfer to a different default relay provider. The petitioner's concerns are primarily the availability of sign language interpreters. Under limited circumstances federal regulatory agencies have intervened to void restrictive covenants. The circumstances, as presented, are not similar to the limited circumstances when intervention occurred. Therefore, the Commission would not be able to intervene on this basis.

Alternative Section 225 authorities

The Commission attempts to strike a balance in crafting regulatory scheme protecting consumers and securing the benefits provided by technology and broad adoption of services.[28] In order to accomplish this goal, the Commission asserts jurisdiction of an issue when state and local rules "undermine a uniform national communications policy".[29] The District Court confirmed, under FCC rules, a State may regulate certain components of an FCC regulated service. [30]

Under the Supremacy Clause, U.S. Const. Art. VI. cl. 2, federal preemption of a state law may be accomplished in a number of ways. First, when Congress enacts a federal statute expressing clear intent to pre-empt a state law.[31] Second, in the absence of language expressing clear intent to pre-empt, Congress comprehensively legislates leaving no room for supplementation by the States (occupying the entire field of regulation).[32] Last, when compliance is impossible[33] or the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[34]

The Supreme Court determined "federal regulations have no less pre-emptive effect than federal statutes." The Commission's decision must "reasonabl[e]y accommodate conflicting policies committed to the agency's care by the statute."[35] The Communications Act give the Commission broad responsibilities to "regulate all aspects of interstate communication by wire or radio;" section 225 of the Act delegates authority to "ensure that telecommunications relay services are available to enable communication in a manner that is functionally equivalent to voice telephone services." [36] Under Title IV of the ADA, the Commission must ensure that telecommunications relay services (TRS) "are available, to the extent possible and in the most efficient manner" to persons in the United States with hearing or speech disabilities.[37]

The Commission described four principles applied when regulating TRS: 1) functional equivalency, 2) availability, to the extent possible, in the most efficient manner, 3) encourage use of new technology and not discourage development of new technology, and 4) functional requirements and minimum standards. In *United States v. Southwestern Cable Co.* the Court found the Commission had been given "broad responsibilities" to

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[28] *CATV Syndicated Program Exclusivity Rules*, 79 F.C.C. 2d, at 744-746.

[29] *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714, 104 S. Ct. 2694, 2708, 81 L. Ed. 2d 580, 599 (1984).

[30] Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 692, 104 S. Ct. 2694, 2696, 81 L. Ed. 2d 580, 584 (1984).

[31] *Jones v. Rath Packing Co.*, 430 U. S. 519, 525 (1977).

[32] *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947).

[33] *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U. S. 132, 142-143 (1963).

[34] *Hines v. Davidowitz*, 312 U. S. 52, 67 (1941).

[35] *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U. S. 141 (1982).

[36] 47 U.S.C. § 225.

[37] *Id*. § 225(b)(1).

regulate all aspects of interstate communication by wire or radio by virtue of § 2(a) of the Communications Act of 1934, 47 U. S. C. § 152(a), and that this comprehensive authority included power to regulate cable communications systems. The Court further explained the Commission's authority extends to all regulatory actions "necessary to ensure the achievement of the Commission's statutory responsibilities."[38]

The Commission, pursuant to its delegated authority under the Communications Act, unambigiously expressed intent to preempt any state or local regulation of signals carried by cable television systems. In contrast, for relay, the Commission adopted a regualtory scheme of structured dualism in which state authorities were given responsbility for granting franchises to providers for intrastate relay, regulating the construction of relay centers and employment of CA's. At the same time, the Commission retained exclusive jurisdiction over all operational aspects of relay, including speed of answer and technical standards. State authorities do have jurisdiction or authority relating to minimum standards. While the state may impose a provision requiring the relay provider to adhere to a higher level of service for intrastate calls that is as far as the State may go.

For example, the Oklahoma advertising ban reached beyond the regulatory authority reserved to local authorites by Commission rules and trespassed into the exclusive domain of the FCC. Oklahoma's advertising ban of out-of-state signals carried by cable operators in that State was designed to further the State's interest in discouraging consumption of intoxicating liquor.[39] The Court found the limited interest of the State did not outweigh the federal objective of ensuring widespread availability of diverse cable services throughout the United States. Here, a state's restrictive covenant jurisprudence furthers the State's interest in protecting workers or encouraging economic output. There are no specific cases presented where enforcement of a restrictive covenant interfere with provision of relay. The State's interest does not frustrate the federal objective of ensuring functionally equivalent telephone service. In fact, there are no specific examples where relay is frustrated by enforcement of a restrictive covenant.

Applicable Standard

If the Commission determines intervention is appropriate, then it should follow similar approaches adopted by States. The general rule is that a covenant not to compete is contrary to public policy unless the covenant protects a legitimate interest of the employer and is not so broad as to be oppressive to the employee or the public. In examining covenants not to compete between interpreters, the Commission must recognize the need to balance the public interest in telecommunications accessibility with the personal freedom of contract and if determined under the particular facts before the Commissioners, the public interest must prevail.

[38] FCC v. Midwest Video Corp., 440 U. S. 689, 706(1979). Accord, United States v. Midwest Video Corp., 406 U. S. 649, 665-667 (1972) (plurality opinion); id., at 675 (BURGER, C. J., concurring in result).

[39] *See* 11 Op. Okla. Atty. Gen. No. 79-334, p. 550 (Mar. 19, 1980)

Despite the freedom to contract, generally restrictive covenants are not favored because they restrain trade, especially in the context of employer-employee. The Commission should strongly disfavor restrictive covenants among interpreters and providers because the provision of VRS affects the public to a much greater degree.

Under most State's law, non-competition covenants are enforced only when reasonable. Reasonableness hinges on the totality of the circumstances. A restriction is unreasonable, thus not enforceable if:

1) the restraint is greater than necessary to protect the employer's legitimate interest; or

2) that interest is outweighed by the hardship to the employee and the likely injury to the public.

Within the context of VRS, the reasonableness inquiry requires an examination of the interests of the employer, interpreter, VRS consumer and public in general, to accommodate a right to contract, a right to work and the public's right to functionally equivalent telephone access. Balancing these competing interests is no simple task and there is no exact formula the Commission can use.

Therefore, the Commission could allow a provider's covenant not to compete, when strictly construed, only if it is in writing, entered into at the time of and as part of a contract of employment based on valuable consideration that is reasonable in scope, time, territory and activity and does not fail due to public policy concerns.

Consideration

The Commission should examine any restrictive covenant to ensure it is based on valuable consideration. Additionally, if the restrictive covenant is created subsequent to the employment relationship there should be separate consideration supporting the covenant. The separate consideration may take the form of a pay raise, additional benefits or advantages for the interpreter, otherwise the Commission should deem the covenant unenforceable.

Provider's Protectable Interest - Training

Sorenson contends that that it has a protectable interest in its interpreter workforce. In the TRS context, providers may have a legitimate interest in retaining their customer base. Sorenson appears to hold the view that the company's interpreters are protectable asset of value acquired by virtue of Sorenson's expenditure of significant resources on training.

Traditional restrictive covenants are unsuitable protection against the loss of investment for training of interpreters

Employer’s investment in training is difficult to protect through restrictive covenants. A survey of 105 noncompete cases found the employer's investment in training insufficient to enforce restrictive covenants. Courts generally do not view investment in training protectable, but will accord a protected status to trade secrets and customer lists.

Professor Gary Becker’s human capital model is widely recognized as showing traditional restrictive covenants are unsuitable protection against training investment loss. He describes two distinct types of training: 1) general training, which increases an employee's marketability to many firms, and specific training, which enhances an employee's value only to the firm providing the training.

Similar to Becker’s argument regarding general training, Sorenson argues there is no incentive to invest when an interpreter can leave with the newly acquired skills to join a competiting provider that is not financially burdened with the expenses of the training.

The restrictive covenants, according to Sorenson, protect the training investment by restricting an interpreter from working for a competitor during employment and for a defined duration after employment is terminated. At some point during an interpreter’s tenure, Sorenson will earn back its investment in training the interpreter. Here, the interpreter is bound from competing against Sorenson even after the company has safely recouped the investment. Because Sorenson justifies upholding the noncompete will foster investment in training by helping providers protect that investment, a noncompete barring an interpreter from competing once the investment is recovered seems patently unfair. Put differently, this noncompete agreement provide a windfall to the provider when the restrictions continue in force after the training investment is recouped.

Consider this hyptothetical. Before hiring and training interpreters to staff a relay business, the provider determines, through a cost-benefit analysis, the number of interpreters and the amount of training necessary to satisfy the mandatory minimum requirements. The analysis might factor restrictive covenants for each interpreter, guaranteeing the training investment is protected if the interpreter leaves the company.

Assume the interpreter is hired and signs a two-year agreement. The provider invests $20,000 worth of training about how to effectively interpret a VRS call. After this amount of training, the interpreter is an attractive recruit for any provider. This interpreter is grateful for the opportunity with their current employer and declines offers for better pay, better hours, etc from other providers. The interpreter continues to work for the provider, for five years, receiving minimal additional training. Amoritizing the investment over the course of employment, it would be reasonable to presume the provider’s original investment is recompensed. However, if the interpreter decided to leave after five years, he would still be restricted from "competing" or working with a different provider for specified time.

An opportunity exists for providers to look for alternatives to protect their investment. Put another way, inconsistency in U.S. noncompete jurisprudence begs the question, why would any provider choose to chance enforceability with a traditional noncompete when a more friendly alternative exists?

Because a court is unlikely to enforce a patently unfair restriction and providers have readily available alternatives the Commission should exercise regulatory restraint by not injecting its policies in the employment of interpreters.

Repayment Agreements Align Training Investment with Provider Need for Protection

Repayment agreements, which require inteprrеters to pay back training expenses if they quit before the employer recoups its investment, respect the intepreter's right to freely contract and establish proportionality between the provider's outlay in training and their restrictions on interpreters.

Repayment agreements can serve as an effective means of addressing the issue of amortized training costs. If designed properly, the repayment amount would reflect the break-even point at which the interpreter's repayment through their normal duties would fully compensate the employer. Repayment agreements, more so than traditional noncompetes, are an equitable method of making the parties whole.

Provider's Protectable Interest – Training - Conclusion

Unique specialized training provided to interpreters could form the basis of a protectable interest justification if it provides an unfair competitive advantage to a competing provider. [40] The competing provider must gain the advantage with investing in it. Proving unfair competitive advantage is challenging because it is difficult to distinguish between generalized experience in video relay and specialized training unique to Sorenson. Employer paid training does not satisfy the uniqueness requirement if it is also readily available through interpreter training programs, workshops, or conferences.[41]

Legitimacy of a restrictive covenant because of the investment in specialized training may be less sustainable the more time passes because the investment is recouped from the time training was given. In Colorado, for example, the state statute recognizes training as a justification but only for employees who have

[40] *See, e.g., Fla. Stat. Ann. §542.335(1)(b)(5)* (listing extraordinary or specialized training as a protectable interest).

[41] *See Springfield Rare Coin Galleries Inc. v. Mileham*, 250 Ill. App. 3d 922, 931–32, 620 N.E.2d 479, 486 (finding no protectable interest in instruction and training employee received regarding nonconfidential non-trade secret information (i.e., the authentication and valuation of rare coins and collectibles)).

served the employer for a period of 2 years or less, implicitly recognizing that training costs are recouped over time.[42] The Commission should carefully consider state laws before relying upon specialized training to allow a restrictive covenant. The Commission likely does not have sufficient staffing to perform the necessary review of relevant state laws.

If a provider relied upon specialized training, then the Commission should require the provider to identify this training with sufficient particularity.

Provider's Protectable Interest - Customer Base

Sorenson has thousands of customers and a strong presence in the VRS market. Typically, restrictive covenants protect an employer's customer base by preventing a skilled employee from leaving and, based on the skill acquired from that employment, luring away the employer's customers before the employer can replace the employee with someone qualified to do the job.

Interpreters may have transient knowledge of customer information briefly before, during and shortly after a call, interpreters are typically not privy to customer records. Without customer records it would be impossible for the interpreter to lure away a provider's customers.

Further, assuming the interpreter could lure a provider's customer to their new employer's service, the caller is unaware and unable to control who will appear to interpret a call. The underlying "follow me to me my new employer" benefit is not realized.

Scope of the Restrictive Covenant

The restriction cannot be greater than necessary to protect a provider’s legitimate interests. A restraint's scope defined by its duration, geographic area, and definition of activities prevented. The employer is given reasonable time to overcome loss of the former employee by hiring a replacement. This time allows the replacement to establish a working relationship. The employee has reasonable opportunity to return to the geographic area after practicing outside of the area or in a different specialty for the duration.

Duration

An unduly lengthy time restraint in a covenant affords more protection to the employer than is justified, given the protectable interests, and is not enforceable. Absolute rules of reasonableness with regard to duration do not exist; two years appears to be the outer boundary of permissible restrictions, although some longer

[42] *COLO. REV. STAT. §8-2-113(2)(c).*

covenants (e.g., three years) found reasonable in duration even using the strict scrutiny applied to these covenants in employment contexts.

Geographic Area

A covenant inclusive of more territory than necessary to protect the legitimate business interests of the provider is not reasonable when it excludes the interpreter from practicing in areas where the provider has no claim to need protection. The question is whether the size of the territory (indicated in Sorenson's contract), which encompasses approximately (how much?), is necessary to protect Sorenson's legitimate interests.

Reasonable geographic restrictions of larger areas upheld on a professional's practice if the employer attracted customers throughout the restricted area. For example, a court upheld a ten county territory because the professional corporation had patients in all ten counties. In a non-physician context, a court upheld a half million square mile area because the employee and employer did business throughout substantial portions of the area.

Activity Prevented

The activity prohibited by the restraint also defines the covenant's scope. In order to protect the provider's legitimate interests, the restraint must be limited to the particular areas of the present employment. In Peairs v. Old Town Orthopedic the court upheld an injunction that restrictive covenant preventing doctor from practicing only orthopedic medicine and orthopedic surgery. Otherwise, the restriction on the physician was too great.

On its face, the restriction at issue here does not preclude any type of interpreting practice, even in settings that do not compete with Sorenson. The covenant does not seem to prohibit an interpreter from providing any and all forms of "interpretation."

Recommendation

The Commission should carefully consider the value our federal system of jurisprudence maintains before delving into the issue of employment restrictive covenants. If the Commission determines intervention is the best course of action, then it should adopt the majority approach to determining enforceability of covenants.